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August 10, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 28, 2004

Case Number: TSO-0081

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization. 1/ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I have determined that the individual's access authorization should be restored.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information.

That information involves the individual's contact with foreigners. The letter referred to the individual's government business trip to

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

a sensitive country during 2000. During that trip, the individual solicited a prostitute who was a native of that country. The Notification Letter also cited the individual's receipt of E-mail from a foreign government official that he met during his trip. The Letter also mentioned that the individual engaged in: (i) a nine-month fantasy relationship with a Polish woman that took place on-line and through monthly telephone contact; (ii) a relationship through weekly E-mail contact with a Czech woman; and (iii) use of a government computer to access a personal hot-mail account that involved contacts with foreign nationals.

The Letter indicated that the individual failed to report these contacts to the DOE. Reporting of certain contact with foreigners is required by DOE Notice 142.1. The Letter stated that the failure to report is a security concern under 10 C.F.R. § 710.8(g)(Criterion G). 2/

The Notification Letter also cited these relationships and contacts as giving rise to a security concern regarding the individual's reliability, and regarding whether the individual could be subject to pressure, coercion and exploitation which may cause him to act contrary to the best interests of the national security. 10 C.F.R. § 710.8(l)(Criterion L). 3/

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE

2/ In relevant part, Criterion G describes as derogatory, information that an individual has "violated or disregarded security or safeguards regulations to a degree which would be inconsistent with the national security." One aspect of the Criterion G concerns cited in the Letter was withdrawn prior to the hearing. April 19, 2004 E-mail from DOE Counsel to Virginia Lipton.

3/ In relevant part, Criterion L describes as derogatory, information that an individual has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress, which may cause the individual to act contrary to the best interests of the national security."

Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual represented himself. The individual testified on his own behalf, and presented the testimony of his wife, his Employee Assistance Program Counselor (Counselor), and a co-worker. The DOE Counsel presented the testimony of a security specialist, and a senior counterintelligence officer at the site where the individual is employed (CI Officer). The DOE Counsel also presented an affidavit from a DOE intelligence operations specialist (IO Specialist) and an affidavit from the counterintelligence officer who briefed and debriefed the individual regarding the official travel involved in this proceeding (CI Officer #2).

II. Hearing Testimony and Affidavits

The issues in this case are first, whether in his contacts with foreign nationals, the individual violated or disregarded security or safeguards regulations to a degree which would be inconsistent with national security (Criterion G); and whether through these contacts, the individual exhibited unreliable behavior that could subject him to undue pressure or coercion (Criterion L). Second, if the individual has exhibited behavior which raises Criteria G and L concerns, whether he has mitigated those concerns.

A. The witnesses provided the following testimony on these issues.

1. Security Specialist

The Security Specialist testified about why the individual's one-time relationship with a prostitute in a foreign country raises security concerns. She indicated that he put himself in a vulnerable position that could have resulted in blackmail. She testified that the incident could have been photographed and recorded and then used against him in an attempt to coerce him to provide sensitive information. Transcript of Hearing (Tr.) at 23. She indicated that the security concern regarding the individual's use of hotmail while using a government computer relates to the possibility that a foreign or other unreliable entity could gain access to the government computer system. The Security Specialist also testified that the individual's failure to report his contacts with these foreign nationals demonstrated a disregard of security

rules and that this raised a concern about his fitness for an access authorization. 4/

2. CI Officer

This witness is the current senior CI Officer at the DOE site where the individual works. He manages the counterintelligence program for this site. He arrived at the site after the individual went on the government foreign travel in question and did not perform any briefings regarding the individual's foreign travel during the year 2000 time frame. He began performing briefings and debriefings at this site in January 2001. Tr. at 215. However, the individual did discuss the foreign trip and the related security concerns with the CI Officer after the commencement of this administrative review process. Tr. at 43, 206-07.

The CI Officer also testified about what types of contacts with foreign nationals must be reported. He stated that "significant contacts" are reportable. However, he stated at the time the incidents involving the individual took place, the definition of "significant contact" was ambiguous. He noted that some DOE material on this subject indicated that only "close and continuing contacts" were subject to reporting. 5/ He stated that in 2000, when he performed briefings for DOE travelers at another DOE site, he did not use this definition and told DOE travelers to report all foreign contacts. However, the CI Officer did not brief this individual, and did not know the content of the briefings this individual received at the time of his trip. He recognized that the individual could have used the "close and continuing contact" standard, and thereby decided that his contact with a prostitute

4/ The Notification Letter also indicated that at his Personnel Security Interview (PSI), the individual at first denied that he solicited a prostitute. The Notification Letter cited this denial as a separate security concern. After reviewing the transcript of the PSI and questioning the Security Specialist about it at the hearing, I made a determination at the hearing that the individual had not actually denied that he went to a prostitute. I determined that the Security Specialist had asked the individual several questions at once and that he had simply not answered the question about the prostitute first. Tr. at 6-15. I therefore determined that no separate security concern had been raised. Tr. at 27.

5/ DOE Notice 142.1, page 4 (August 17, 1999).

need not be reported, since it involved only a one-night stand. Tr. at 50-60. He indicated that the year 2000 definition of what is reportable needed some fine-tuning and noted that it has since been changed. Tr. at 96-97.

The CI Officer described the security concerns involved if a person engages a prostitute. He indicated that such a person becomes vulnerable to coercion and blackmail because of the possibility of photographs and video recordings of the incident. It was his opinion that the holder of an access authorization should report this type of encounter. Tr. at 44-46.

The CI Officer also testified about whether the individual's Internet and phone contacts with foreign nationals should have been reported. He indicated that Internet contact with a Czech national did not need to be reported since there was no solicitation. Tr. at 200-201. He indicated that whether the individual should have reported his fantasy romantic relationship with the Polish individual was a "tough call." Tr. at 202. He believed that an important factor is that it was an ongoing relationship that lasted several months and involved both Internet and telephone contact on a regular basis. He stated that he tells individuals whom he briefs to report ongoing communications with foreign nationals. Tr. at 202. With respect to the non-romantic E-mail the individual received from the government official, the CI Officer stated that the contact should have been reported because it was a "follow-up" contact, an attempt to continue a relationship. However, he did not consider it a serious reporting deficiency. Tr. at 73, 89. It was his overall view that employees should err on the side of over-reporting, rather than deciding for themselves if an incident is reportable. Tr. at 202.

In addition, the CI Officer discussed what an individual may do to mitigate and ultimately resolve a Criterion G security concern. He stated that an individual must first admit to the behavior that gave rise to the concern. Ideally, this admission would take place before the individual was confronted by the DOE. Tr. at 78, 82. A second mitigating factor would be that the behavior came about due to improper training. A third factor would be that the individual demonstrates a positive attitude towards the discharge of his security responsibilities. Tr. at 78-80.

3. Individual

The individual described his contacts with the foreign nationals: the one night stand with the prostitute, the romantic fantasy relationship with the Polish national, which was conducted via the Internet and telephone; and the E-mail from the government official whom he met in a professional capacity on his trip.

He stated that he had a one-time only encounter with a prostitute during his trip to a sensitive foreign country. Tr. at 119. He denied that he had any Internet or other relationship with a Czech national. He said that he was confused when he was discussing this issue in his PSI. He indicated that he was simply giving an example when he made a reference to a Czech national. He stated that the contact with the Polish woman was the only ongoing contact he had. The rest of his Internet contacts were simply one-time or infrequent "hot-mails." Tr. at 102-110. He stated that he was engaging in multiple contacts over the Internet, but denied it was for sexual gratification. He considered it just "flirting." Tr. at 111-113. The individual stated that the E-mail from the government official was a follow-up Christmas message that was sent to a number of individuals, and that he forwarded a copy of it to the IO Specialist. Tr. at 114, 116, 136. 6/ He also testified that he was not informed during the briefings and debriefings he received after his 2000 travel that he should reveal his one-night stand with a prostitute. Tr. at 125, 128.

The individual also discussed the efforts he has made to correct the behaviors discussed above, and mitigate the security concerns. He stated that he no longer frequents Internet chat rooms. He revealed the prostitution incident to his wife and family. He acknowledged that he had an Internet addiction. Tr. at 132. He has received marital therapy and Internet addiction therapy for 10 months. Tr. at 131-132. He recognizes the seriousness of Criteria G and L security concerns about his behavior. Tr. at 132-33. He states that he is keeping better E-mail records now, documenting his E-mail contacts, and making appropriate reports to the DOE about foreign contacts. Tr. at 133.

6/ The individual indicated that there may have actually been several E-mail messages from the foreign official, but he was only aware of one. Tr. at 136

4. Individual's wife

The individual's wife confirmed that in July of 2003 the individual told her about the prostitution incident, and thereafter informed their son about the incident. Tr. at 230, 233. She also testified that she was aware of his use of Internet chat rooms and his ongoing romantic fantasy Internet contact with a foreign woman. Tr. at 227. She believes that the individual's behavior has changed. She is confident that the individual is no longer using the Internet for recreational purposes, and that his Internet addiction is under control. Tr. at 237, 244. She testified that hot-mail has been deleted from their home computer. Tr. at 231. She testified about their marital therapy and believes that it has helped them a great deal. Tr. at 235, 241. She is committed to remaining in therapy until their marital and personal issues are resolved. Tr. at 242. She stated that the individual has done a lot of reading on security matters to be sure about the correct behavior. She believes that in the future, he will seek help if he has a question, rather than try to decide issues for himself. Tr. at 241.

5. Counselor

The Counselor testified that she has had considerable experience treating patients with Internet addiction. Tr. at 146. She stated that she has been meeting with the individual and his wife once a week for about 10 months. She testified that the issues that they are working on include the individual's possible loss of his access authorization, the prostitution incident, his marital problems and his excessive use of the Internet to seek out pornographic web sites and chat rooms. Tr. at 140-41. She indicated that the individual has read books regarding the addiction process, and that the individual and his wife have been reading books together to improve their marital relationship. She indicated that with her recommendation, the individual also used the Internet for therapy chat rooms regarding Internet addiction. Tr. at 143. She stated that the individual should not use the Internet for entertainment purposes. Tr. at 145, 156. She testified that, based on her recommendation, the individual and his wife had agreed to 12 months of therapy. Tr. at 154-55. She testified that the individual has been very serious in his commitment to therapy, and that he "has been more focused on resolving his issues than any other client in this area that I've ever had." Tr. at 156. She indicated that the individual and his wife "have been textbook clients. I don't get them very often. . . . [t]hey have been the most cooperative clients for therapy I've had in a long time." Tr. at 165. The Counselor believes that the Internet compulsion and the prostitution issue have been resolved. Tr. at 158. However, she also stated that as

a precaution, he should remain in therapy until his clearance is restored. Tr. at 157. Overall, the remaining therapy for this individual and his wife involves their marital problems. Tr. at 165.

The counselor also testified about what she believes the individual has learned from his therapy. She stated that he now understands that he must take responsibility for his actions, to be cautious, rather than to take risks. She indicated that the individual is no longer in denial about his responsibilities. She stated that the individual now says "I should have done this. I should have done that. If I had to go back and do this again, this is the way I would have done it, not the way I did." Tr. at 160. She believes that he has learned a lot about the process of addiction, and how it affects him physically and emotionally, and the steps he must take to correct the problem. Tr. at 161.

6. Co-worker

The co-worker stated that he has known the individual for several years and that they see each other daily because they ride to work together. They also socialize outside of work. Tr. at 169-70. The co-worker stated that the individual had spoken to him about the prostitution incident and the Internet addiction that are the subject of this case. Tr. at 172, 180, 182. The co-worker was under the impression that the individual did not need to report the Internet use because it took place at home. He indicated that this issue had not been addressed in their security briefings about computers. Tr. at 172. Based on their discussions, he does not think the individual has returned to Internet use. Tr. at 173. He believes that the individual is trustworthy. Tr. at 180.

B. Affidavits

1. CI Officer #2

CI Officer #2 stated in his affidavit that he was with the individual during the individual's second trip to the sensitive foreign country, which took place in July 2000. He stated that he participated in the debriefing of the individual and the "solicitation of the prostitute was not an issue discussed in the debrief." 7/

7/ The affiant could not be present at the hearing because he was attending to a serious family illness in another state. Tr. at 63.

2. IO Specialist

In his affidavit, the IO Specialist stated that he briefed the individual before his trip to the sensitive country and debriefed him upon his return. ^{8/} He indicated that these briefings/debriefings followed a standard format that included matters such as (i) to be aware of anyone offering sexual services because this could be an attempt to blackmail; and (ii) to be aware that hotel rooms could be electronically surveilled. He further stated that he did not recall if the individual told him that he had a one-time sexual relationship with a woman in the sensitive foreign country. He stated that if the individual had informed him of that relationship, he would have followed up with a series of questions.

III. Regulatory Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden

^{8/} This affiant was in the process of retiring from his position at the DOE site. Tr. at 63. The DOE Counsel and the individual agreed that this witness' descriptions of his recollections of his briefing and debriefings of the individual would be sufficient for purposes of this case, and that examination and cross examination would not be useful. See Letter of April 16, 2004.

of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

Criterion G

The Criterion G security concerns in this case relate to whether the individual violated security rules and regulations by failing to report the prostitution incident, the E-mail from the foreign official and the Internet fantasy romance with a foreigner. The testimony of the CI Officer indicated that the prostitution incident, the follow-up E-mail Christmas greeting from the foreign government official and the ongoing Internet/phone contact with the foreign national should have been reported. 9/ I believe that the individual's failure to disclose these contacts does raise Criterion G concerns.

However, I find that the concerns have been mitigated. I believe that the reporting requirements with respect to the prostitution incident was not clear. For example, the CI Officer indicated that during the period when the prostitution incident took place, the definition of a reportable incident was ambiguous. He also indicated that whether or not the fantasy relationship was reportable was a "tough call." Tr. at 202. The CI Officer also stated that the E-mail from the foreign official did not present a serious reporting deficiency. These considerations lessen the overall seriousness of the individual's failure to report these incidents.

9/ The CI Officer stated that the E-mail contact with the Czech national did not need to be reported. The individual has denied that there was such a contact. I believe that the individual was confused during the PSI and I am therefore convinced that he had no Internet relationship with a Czech national. In any event, since the CI Officer indicated that there was no need to report this contact, I believe that it presents no separate Criterion G concern. I will therefore give it no further consideration.

There are other important factors here that mitigate the Criterion G security concern. 10/ Based on the affidavits from the IO specialist and CI Officer #2, the individual's testimony, and that of the co-worker, I believe that the individual's training in this area was somewhat perfunctory and not performed with sufficient detail so as to permit the individual to fully understand the scope of his reporting obligations. I also am convinced from the individual's testimony that he is now more aware of reporting requirements, has educated himself on this issue, has taken relevant classes, and has demonstrated a serious and positive attitude toward discharge of security responsibilities. Tr. at 120. The CI Officer testified that he believed that the individual now has a good understanding of reporting requirements. Tr. at 218. I believe that for the foreseeable future, the individual will be very sensitive to the importance of adhering to security rules and regulations. Finally, the behavior at issue here occurred some time ago.

Based on the above considerations, I find that the Criterion G security concerns have been resolved.

Criterion L

There is no question in this case that the individual's behavior has raised security concerns under Criterion L. He engaged a prostitute in a sensitive foreign country. This behavior could have subjected him to blackmail and coercion. He conducted fantasy relationships with women over the Internet. 11/ This also could have subjected him to blackmail and coercion. He used his government computer to read his hot mail messages. This could have allowed strangers, including foreign nationals, to gain access to a government computer system. Such behavior raises questions about the individual's reliability and trustworthiness. However, as discussed below, the individual has mitigated these concerns.

As an initial matter, the individual convinced me that he recognizes the problems with his actions that are the subject of this proceeding, and he takes full responsibility for them. He was genuinely remorseful about the prostitution incident and I am persuaded that he will not repeat that behavior. I was very impressed by his commitment to therapy for his Internet addiction.

10/ These factors reflect those cited by the CI Officer, which I referred to above. Tr. at 78-80.

11/ Aside from the relationship with the Polish woman, the individual had a number of contacts through hotmail. Tr. at 108

The testimony of the individual, his wife and his Counselor convinced me that the individual will not return to irresponsible use of the Internet. I further believe that since the individual has revealed even the embarrassing prostitution and Internet romantic relationships to his family and a friend, there is little concern at this point with respect to blackmail or coercion.

I note the Counselor's testimony that, based on her recommendation, the individual and his wife had agreed to 12 months of therapy. Tr. at 154-55. As of the time of the hearing, only 10 months of the 12-month therapy commitment had been completed. I do not believe that this should bar the individual from access authorization. First, the time remaining is not very long. The therapy is virtually completed. Further, the individual has by all accounts taken his therapy program very seriously. Moreover, I believe that the two additional months of therapy are more directed toward marital issues. Tr. at 243. Finally, I am persuaded that the Internet and prostitution issues are resolved, and that the Counselor is satisfied that the individual will not return to improper use of the Internet or to solicitation of a prostitute. These are the behaviors that presented security concerns. I do not believe that the Counselor's view that the individual needs two additional months of marital therapy is a determinative factor with respect to the security concerns here.

The Counselor also suggested that the individual continue with his therapy until his clearance is restored. However, the counselor viewed this as a precautionary measure, to make sure he is "on track." Tr. at 157. She believed that the individual's Internet addiction and prostitution issues have been resolved. Tr. at 158. I therefore see no security concern if the individual's access authorization is restored while he is continuing with some follow-up therapy.

V. CONCLUSION

I believe the individual is genuinely committed to refraining from improper Internet use, will not subject himself to situations that could be exploitative or coercive, and has demonstrated a positive attitude towards the discharge of his security responsibilities. I therefore find that the individual has mitigated the Criteria G and L security concerns cited in the Notification Letter. It is thus my conclusion that the individual's access authorization should be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: August 10, 2004